IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

SHAWN L. BRIESE
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion Petitioner seeks to have this Court review is reported in Quince v. State, 414 So.2d 185 (Fla. 1982) (Appendix 1).

JURISDICTION

Respondent concedes that to the extent that the application of §921.141 Fla Stat. (1979) is drawn in question on the ground of the application being repugnant to the constitution, jurisdiction would properly vest pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that U.S. Const. amend.VIII, XIV, §1 and §921.141 Fla. Stat. (1979) are involved.

STATEMENT OF THE CASE

Respondent hereby accepts Petitioner's statement of the case for the sole purpose of argument herein with the following additions:

The federal constitutional issue which Petitioner raises in the instant petition was not properly raised as a federal constitutional issue before nor passed upon by the Florida Supreme Court (See Reasons for Not Granting the Writ Section, infra).

REASONS FOR NOT GRANTING THE WRIT

The federal constitutional issue which Petitioner raises in the instant petition was not properly raised as a federal constitutional issue before nor passed upon by the Florida Supreme Court. While Petitioner raised such issue in his Motion for Rehearing (Appendix 2) he did not raise it in his Initial Brief (Appendix 3). Fla.R.App.P. 3.330(a) provides that a motion for rehearing shall state with particularity the points of law or fact which the court has overlooked or misapprehended. Implicit in the above statement is the fact that the initial presentation of a matter on rehearing is prohibited. Sarmiento v. State, 371 So.2d 1047 (Fla. 3d DCA 1979) (Affirmed State v. Sarmiento, 392 So.2d 643 (Fla. 1981)) and Delmonico v. State, 115 So.2d 368, (Fla. 1963). Thus, Petitioner's initial presentation of the federal constitutional issue, which he is presently raising, in his

Motion for Rehearing was prohibited; the Florida Supreme Court, in denying his motion (Appendix 4), did not rule on the merits of that particular point.

It was very early established that this Court will not decide federal constitutional issues raised before it for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S.437, 89 S.Ct.1101 (1969). It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. Webb v. Webb, ___U.S.___, 101 S.Ct.1889 (1981). Thus, since Petitioner, in the present case, never raised the federal constitutional issue, which he is now attempting to raise, before the Florida Supreme Court in his Initial Brief and could not initially raise the issue in his Motion for Rehearing, this Court has no jurisdiction to decide the issue since the issue was not passed upon by the Florida Supreme Court.

Petitioner complains that the Florida Supreme Court's refusal to independently reweigh mitigating evidence makes his sentence constitutionally infirm in violation of U.S. Const. amend. VII,XIV, §1. This issue arose in the court's opinion when it dealt with Petitioner's assertion that the trial judge erred in giving only little weight to the sole mitigating factor found; substantial impairment of the capacity to appreciate the criminality of his act or to confirm his conduct to the requirements of law (§921.141(6)(f) Fla. Stat.(1979)). The Florida Supreme Court correctly noted that this is a case in which Petitioner disagrees with the weight that the trial judge accorded the mitigating factor. Mere disagreement with the weight to be given such evidence is an insufficient basis for challenging a sentence. Tibbs v. Florida, ___U.S.___, 102 S.Ct.2211 (1982).

This Court in Proffitt v. Florida, 428 U.S.242, 96 S.Ct. 2960 (1976) noted that §921.141 Fla. Stat. does not require the court to conduct any specific form of review. The Florida Supreme Court considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach

a similar result to that reached under similar circumstances in another case... If a defendant is sentenced to die, this court can review that case in light of other decisions and determine whether or not the punishment is too great, citing State v. Dixon, 283 So.2d, (Fla. 1973).

This Court went on to note that the Florida capital sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted", citing Songer v. State, 322 So.2d 481 (Fla. 1975) and Sullivan v. State, 303 So.2d 632 (Fla. 1974). See also McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Douglas v. State, 328 So.2d 18 (Fla. 1976); Alvord v. State, 322 So.2d 533 (Fla. 1975); and Lamadline v. State, 303 So.2d 17 (Fla. 1974).

The Florida Supreme Court in Harvard v. State, 375 So.2d 833 (Fla. 1977) held that when the sentence of death has been imposed, it is its responsibility to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. It must also insure that punishment for murder is evenly applied so that similar homicides will draw similar penalties.

The court in Sireci v. State, 399 So.2d 964 (Fla. 1981) noted that findings of a judge, i.e., as to aggravating and mitigating circumstances, are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. See also Smith v. State, 407 So.2d 894 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The court's role is not and should not be to cast aside the careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been material departure by either of them from their proper functions

prescribed by §921.141 Fla. Stat., or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great. Hargrave v. State, 366 So.2d 1 (Fla. 1978).

It is the court's responsibility to insure that the trial judge remains faithful to the dictates of §921.141 Fla. Stat. in the sentencing process. It is not the function of the court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. Mikenas v. State, 367 So.2d 606 (Fla. 1978)(Affirmed on remand for resentencing 407 So.2d 892 (Fla. 1981).

Most recently the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)(Certiorari denied ___U.S. ___, 102 S.Ct.542 (1981) stated:

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected [Tedder v. State, 322 So.2d 908 (Fla. 1975)], and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

The court noted that their role is neither more or less, but precisely the same as that employed by this Court in its review of capital punishment cases.

The Florida Supreme Court has not exhibited a recent change in its sentence review function. The sentence review function does not involve the weighing of the evidence to establish aggravating and mitigating circumstances but rather to determine whether there was sufficient evidence in the record from which the judge and jury could properly find the presence

of aggravating and mitigating circumstances. Once the court has determined that there was sufficient evidence to support the aggravating and mitigating circumstances that were found, the court must only make a reasoned review of the aggravating and mitigating circumstances to determine whether the death penalty is warranted.

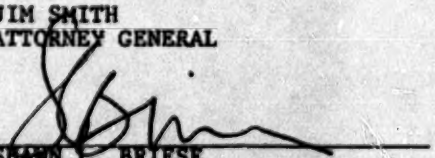
The reviewing and reweighing evidence of aggravating and mitigating circumstances as stated in Proffitt v. Florida, supra, refers to this reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the aggravating and mitigating circumstances present. The Florida Supreme Court, in the present case, has not deviated from the requirements of Proffitt v. Florida, supra, but in fact has fully complied with its requirements. The Florida Supreme Court's affirmance of the Petitioner's sentence thus does not violate U.S. Const. amend. VIII, XIV, §1.

CONCLUSION

Based upon the foregoing cases, authorities, and arguments herein, the Petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



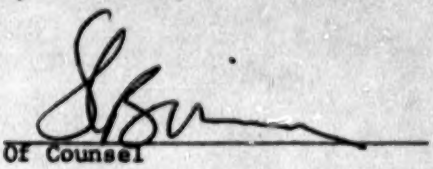
SHAWN L. BRIESE
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, SHAWN L. BRIESE, Counsel for the State of Florida, the Respondent, hereby certify that on August 18th, 1982, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Response to Petition for Writ of Certiorari with attached appendix on Kenneth Darcell Quince, the

Petitioner, by depositing said copy in a United States Mail Box, with first class postage prepaid, properly addressed to Ronald K. Zimmett, Esquire; Chief Assistant Public Defender; 1012 South Ridgewood Avenue; Daytona Beach, Florida 32014-6183.



Of Counsel